

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

DWIGHT RODGERS,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CIVIL ACTION NO:
	)	2:06-CV-1067-WKW-SRW
CRACKER BARREL OLD	)	
COUNTRY STORE, INC.,	)	
	)	
DEFENDANT.	)	

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S RESPONSE TO SHOW CAUSE  
ORDER AND MOTION TO STRIKE PLAINTIFF'S DELINQUENT BRIEF AND  
EVIDENCE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT**

COMES NOW Defendant Cracker Barrel Old Country Store, Inc. ("Cracker Barrel"), and responds to plaintiff's response to this Court's Show Cause Order and moves to strike plaintiff's belatedly filed brief and "evidence" in opposition to defendant's Motion for Summary Judgment. The grounds for this motion is as follows:

1. This Court entered a Scheduling Order in this case on April 11, 2007, in which the Court set August 2, 2007 as the deadline for filing all dispositive motions. The Court also entered a Briefing Order on April 11, 2007, in which the Court ordered that the plaintiff's response brief and any evidentiary submission "shall be due 21 days after the date the motion is **filed.**" (emphasis added).

2. In accordance with the Court's Orders, the defendant electronically filed a Motion for Summary Judgment and accompanying brief and evidence on August 2, 2007. Electronic notice was sent simultaneously to plaintiff's counsel, Byron Perkins, through the Court's Case Management/Electronic Case Files (CM/ECF) System. Because Monica York, who is also

counsel for plaintiff, had not registered her electronic information with the Court as required, the defendant sent her its motion, brief and evidentiary submission by e-mail. (See Exhibit 1). The e-mails were delivered to her computer server between 12:06 and 12:07 p.m. on August 2, 2007. (See Exhibit 2). Moreover, as Ms. York admits in the response to the Show Cause Order, she had access to the PACER system and could read and print all documents filed, which would include defendant's Motion for Summary Judgment and supporting submissions.

3. As ordered by the Court, plaintiff's response to defendant's summary judgment submissions were due 21 days after the filing date of August 2, which was August 23, 2007.

4. Plaintiff did not file any pleading until August 31, 2007 on which day plaintiff filed a response to the Court's Show Cause Order, a response to defendant's Motion for Summary Judgment, a brief and evidentiary submissions. Defendant's counsel received those pleadings by mail on August 31.

5. Plaintiff's counsel knew that plaintiff's summary judgment submissions were due on August 23. On August 17, plaintiff's counsel was in defendant's counsel's office reviewing documents (which defendant had offered to plaintiff over two months earlier), and they asked defendant's counsel's paralegal to copy some of the documents for them while they waited. When the paralegal offered to copy and mail the documents to them, they insisted that they take the documents with them that day because their brief was due "next week."

6. In his response to this Court's Show Cause Order, the plaintiff gives a convoluted and disingenuous response for his failure to file a response to the Summary Judgment Motion on August 23, 2007, which was the deadline imposed by the Court. Plaintiff appears to argue that Federal Rules of Civil Procedure 5 and 6 allowed him an additional three days in which to respond to defendant's motion, and that because the three days ended on a Sunday, he was

allowed to file the brief on Monday, August 27. Plaintiff's excuse does not hold water because the Court's Briefing Order clearly provides that the plaintiff's brief is due 21 days after the motion was filed - not when the motion was served (but the service was the same day as filed as noted above). Thus, Rules 5 and 6, which pertain to computation of the time for service, are not applicable to this situation.

7. The plaintiff also states that he had until August 27, 2007 to either file or serve his response to the motion and that he mailed the defendant copies of his response on that day. Plaintiff is wrong again. This Court's Order set the deadlines for each party to file their submissions, and the Order does not provide that serving opposition pleadings is a permissible substitute for filing those pleadings. Moreover, although plaintiff's counsel claims that she mailed copies to defendant's counsel on August 27, defendant's counsel did not receive them until August 31.

8. Finally, even if plaintiff believed the deadline was August 27, he missed that deadline as well because he did not file any responsive pleadings until August 31. Plaintiff has no legitimate explanation for why he did not file a response to defendant's Motion for Summary Judgment until August 31, 2007, eight days after the response was due, four days after plaintiff's counsel claims she thought it was due, and three days after the Show Cause Order.

9. Plaintiff's counsel recently filed an amended affidavit in support of the response to the Show Cause Order correcting a previous misrepresentation and admitting that the documents were not sent to local counsel for plaintiff for filing until August 29, 2007. This affidavit further highlights the fact that plaintiff took no steps to file anything in response to the Motion for Summary Judgment until after this Court entered a Show Cause Order.

10. Plaintiff's delinquent submissions should be struck and not considered by this Court because they were filed in direct contradiction to the rules set by the Court and which both parties were obligated to follow. Federal Rule of Civil Procedure 83(b) explicitly gives the district court the right to regulate practice as long as the parties have actual notice of the requirement. Fed. R. Civ. P. 83(b). The advisory committee comments to the rule provide that "[f]urnishing litigants with a copy outlining the judge's practices - or attaching instructions to a notice setting a case for conference or trial - would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained." Fed. R. Civ. P. 83 advisory committee notes. The Eleventh Circuit has upheld the district court's authority to make and enforce such rules. "Concomitant with the district court's power to make rules and issue orders is the power to enforce those rules and orders." U.S. v. Venske, 296 F.3d 1284, 1291 (11th Cir. 2002) (citing Magluta v. Samples, 162 F.3d 662 (11th Cir. 1998)), cert. denied, 540 U.S. 1011 (2003); see also Carroll v. Jaques Admiralty Law Firm, P.C., 110 F.3d 290 (5th Cir. 1997) (holding that district court had discretion to impose sanctions outside the scope of Fed. R. Civ. P. 37); In re Atlantic Pipe Co., 304 F.3d 135 (1st Cir. 2002) (holding that district court has the power to regulate its calendar and manage its docket as long as it complies with the Federal Rules of Civil Procedure); Beaird v. Seagate Technology, Inc., 145 F.3d 1159 (10th Cir. 1998) (holding that district court had authority to regulate the submission of briefs), cert. denied, 525 U.S. 1054 (1998).

11. Plaintiff had clear actual notice of the briefing deadlines in this case because this Court entered an order in this case setting those deadlines. This Court has the power to enforce those deadlines, and because the plaintiff disregarded those deadlines and has provided no legitimate reason for doing so, this Court should not hesitate to enforce its rules.

12. Wherefore, premises considered, the defendant respectfully requests that the Court refuse plaintiff's response to the Show Cause Order and strike plaintiff's submissions in response to defendant's Motion for Summary Judgment.

s/ Jennifer M. Busby  
Jennifer M. Busby (BUS009)  
Ashley H. Hattaway (HAT007)

Attorneys for Cracker Barrel Old Country  
Store, Inc.

**OF COUNSEL:**

BURR & FORMAN LLP  
3400 Wachovia Tower  
420 North 20th Street  
Birmingham, Alabama 35203  
Telephone: (205) 251-3000  
Facsimile: (205) 458-5100

**CERTIFICATE OF SERVICE**

I hereby certify that on September 5, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Byron R. Perkins  
The Cochran Law Firm  
505 North 20th Street, Suite 825  
Birmingham, Alabama 35203

Monica A. York, Esq.  
Breedlove & Lassiters, LLP  
250 E Ponce de Leon Avenue  
Suite 425  
Decatur, GA 30030

s/ Jennifer M. Busby  
OF COUNSEL

# **EXHIBIT 1**

**Luckey, Terrie**

---

**From:** Luckey, Terrie  
**Sent:** Thursday, August 02, 2007 12:06 PM  
**To:** 'myork@breedloveandlassiter.com'  
**Cc:** Hattaway, Ashley H.; Busby, Ginger  
**Subject:** FW: Activity in Case 2:06-cv-01067-WKW-SRW Rodgers v. Cracker Barrel Old Country Store, Inc. "Motion for Summary Judgment"

-----Original Message-----

**From:** efile\_notice@almd.uscourts.gov [mailto:efile\_notice@almd.uscourts.gov]  
**Sent:** Thursday, August 02, 2007 10:51 AM  
**To:** almd\_mailout@almd.uscourts.gov  
**Subject:** Activity in Case 2:06-cv-01067-WKW-SRW Rodgers v. Cracker Barrel Old Country Store, Inc. "Motion for Summary Judgment"

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**U.S. District Court**

**Alabama Middle District**

**Notice of Electronic Filing**

The following transaction was received from Hattaway, Ashley Heron entered on 8/2/2007 at 10:51 AM CDT and filed on 8/2/2007

**Case Name:** Rodgers v. Cracker Barrel Old Country Store, Inc.  
**Case Number:** 2:06-cv-1067  
**Filer:** Cracker Barrel Old Country Store, Inc.  
**Document Number:** 16

**Docket Text:**

MOTION for Summary Judgment by Cracker Barrel Old Country Store, Inc.. (Hattaway, Ashley)

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768008-0]  
[20c49158741ce0a499804fd6bdea9ced9b81ade9dada83928cd75178754fe24ddc648  
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**2:06-cv-1067 Notice will be electronically mailed to:**

Jennifer Manasco Busby gbusby@burr.com, MMontgom@burr.com, TLuckey@burr.com

Ashley Heron Hattaway ahattawa@burr.com, rstewart@burr.com

Byron Renard Perkins BPerkins@cochranfirm.com

8/31/2007

**2:06-cv-1067 Notice will be delivered by other means to:**

Monica Alayne York  
Breedlove & Lassiter, LLP  
250 East Ponce De Leon Avenue  
Suite 425  
Decatur, GA 30030

**Luckey, Terrie**

---

**From:** Luckey, Terrie  
**Sent:** Thursday, August 02, 2007 12:07 PM  
**To:** 'myork@breedloveandlassiter.com'  
**Cc:** Hattaway, Ashley H.; Busby, Ginger; 'BPerkins@cochranfirm.com'  
**Subject:** FW: Activity in Case 2:06-cv-01067-WKW-SRW Rodgers v. Cracker Barrel Old Country Store, Inc. "BRIEF/MEMORANDUM in Support"

-----Original Message-----

**From:** efile\_notice@almd.uscourts.gov [mailto:efile\_notice@almd.uscourts.gov]  
**Sent:** Thursday, August 02, 2007 11:44 AM  
**To:** almd\_mailout@almd.uscourts.gov  
**Subject:** Activity in Case 2:06-cv-01067-WKW-SRW Rodgers v. Cracker Barrel Old Country Store, Inc. "BRIEF/MEMORANDUM in Support"

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**U.S. District Court**

**Alabama Middle District**

Notice of Electronic Filing

The following transaction was received from Hattaway, Ashley entered on 8/2/2007 at 11:43 AM CDT and filed on 8/2/2007

**Case Name:** Rodgers v. Cracker Barrel Old Country Store, Inc.  
**Case Number:** 2:06-cv-1067  
**Filer:** Cracker Barrel Old Country Store, Inc.  
**Document Number:** 18

**Docket Text:**

BRIEF/MEMORANDUM in Support re [16] MOTION for Summary Judgment filed by Cracker Barrel Old Country Store, Inc.. (Hattaway, Ashley)

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

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53886459d451536357a3483f0452ab8a3ed9c9458a5667e77c791524e4a]]

**2:06-cv-1067 Notice will be electronically mailed to:**

Jennifer Manasco Busby gbusby@burr.com, MMontgom@burr.com, TLuckey@burr.com

Ashley Heron Hattaway ahattawa@burr.com, rstewart@burr.com

8/31/2007

**2:06-cv-1067 Notice will be delivered by other means to:**

Monica Alayne York  
Breedlove & Lassiter, LLP  
250 East Ponce De Leon Avenue  
Suite 425  
Decatur, GA 30030

8/31/2007

**Luckey, Terrie**

---

**From:** Luckey, Terrie  
**Sent:** Thursday, August 02, 2007 12:07 PM  
**To:** 'myork@breedloveandlassiter.com'  
**Cc:** Hattaway, Ashley H.; Busby, Ginger; 'BPerkins@cochranfirm.com'  
**Subject:** FW: Activity in Case 2:06-cv-01067-WKW-SRW Rodgers v. Cracker Barrel Old Country Store, Inc. "Evidentiary Submission"

-----Original Message-----

**From:** efile\_notice@almd.uscourts.gov [mailto:efile\_notice@almd.uscourts.gov]  
**Sent:** Thursday, August 02, 2007 11:10 AM  
**To:** almd\_mailout@almd.uscourts.gov  
**Subject:** Activity in Case 2:06-cv-01067-WKW-SRW Rodgers v. Cracker Barrel Old Country Store, Inc. "Evidentiary Submission"

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**U.S. District Court**

**Alabama Middle District**

**Notice of Electronic Filing**

The following transaction was received from Hattaway, Ashley entered on 8/2/2007 at 11:06 AM CDT and filed on 8/2/2007

**Case Name:** Rodgers v. Cracker Barrel Old Country Store, Inc.  
**Case Number:** 2:06-cv-1067  
**Filer:** Cracker Barrel Old Country Store, Inc.  
**Document Number:** 17

**Docket Text:**

Evidentiary Submission re [16] MOTION for Summary Judgment filed by Cracker Barrel Old Country Store, Inc.. (Attachments: # (1) Exhibit A-Affidavit of Rich Alexander & Ex. to Affidavit# (2) Exhibit A - Ex. 2 to Alexander Affidavit# (3) Exhibit A - Exs.3-8 to Alexander Affidavit# (4) Exhibit B - Rodgers Depo (part 1)# (5) Exhibit B - Rodgers Depo (part 2)# (6) Exhibit B - Exs. 1-15 to Rodgers Depo# (7) Exhibit C - RTM (Arby's) Records# (8) Exhibit D - Interrog Responses# (9) Exhibit E - Bojangles Records# (10) Exhibit F - Ruby Tuesday Records# (11) Exhibit G - Affidavit of Tommie Patterson & Ex.1# (12) Exhibit H - EEOC Statement of Penny Schmidt)(Hattaway, Ashley)

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit A-Affidavit of Rich Alexander & Ex. to Affidavit

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-1]

8/31/2007

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**Document description:**Exhibit A - Ex. 2 to Alexander Affidavit

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit A - Exs.3-8 to Alexander Affidavit

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-3]  
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**Document description:**Exhibit B - Rodgers Depo (part 1)

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-4]  
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**Document description:**Exhibit B - Rodgers Depo (part 2)

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit B - Exs. 1-15 to Rodgers Depo

**Original filename:**n/a

**Electronic document Stamp:**

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**Document description:**Exhibit C - RTM (Arby's) Records

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-7]  
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**Document description:**Exhibit D - Interrog Responses

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-8]  
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**Document description:**Exhibit E - Bojangles Records

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-9]  
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**Document description:**Exhibit F - Ruby Tuesday Records

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-10]

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fe857b34a0d4d4d24492c1a07964d039e627b91677fb14e4d860dd6e9fb8]]

**Document description:**Exhibit G - Affidavit of Tommie Patterson & Ex.1

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-11]

[5f93a62151ef20fbf87f3687f388d8cc63b8affd9118c98a8e7cf5bf07dc1e09b012

a7ee13c9016e185f349905183134c60a9e9895fe0a8086867170339b2b43]]

**Document description:**Exhibit H - EEOC Statement of Penny Schmidt

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1053018227 [Date=8/2/2007] [FileNumber=768029-12]

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e5385dff55ebd809fba7821795c41175c409dbbb3bef45b89d63e0db4a2]]

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Ashley Heron Hattaway ahattawa@burr.com, rstewart@burr.com

Byron Renard Perkins BPerkins@cochranfirm.com

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Suite 425  
Decatur, GA 30030

8/31/2007

## **EXHIBIT 2**

**Luckey, Terrie**

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**From:** Saunier, Eddie

**Sent:** Wednesday, September 05, 2007 1:57 PM

**To:** Busby, Ginger

**Subject:** EMail

The three emails from TLuckey to [myork@breedloveandlassiter.com](mailto:myork@breedloveandlassiter.com) were delivered to mail.east.cbeyond.com (66.180.96.56) between 12:06pm and 12:07pm on 8/2/07.

The three emails from GBusby to [myork@breedloveandlassiter.com](mailto:myork@breedloveandlassiter.com) were delivered to mail.east.cbeyond.com (66.180.96.56) on:

8/28/07 – delivered at 1:37pm

8/29/07 – delivered at 10:54am

8/30/07 – delivered at 4:26pm

Eddie Saunier

9/5/2007